Supreme Court, U.S.
FILED
MAR 12 2003
CLERK

(4)

No. 02-1067

In the Supreme Court of the United States

IN RE NEW ORLEANS TRAIN CAR LEAKAGE FIRE LITIGATION

NOVA CHEMICALS INC.,

PETITIONER,

v.

LEONARD ADAMS, MICHAEL NOAL, VIRGINIA PHILLIPS, DEBRA BLACK, ET AL.,

RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE LOUISIANA FOURTH CIRCUIT COURT OF APPEAL

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

The Petition made four basic points, which together establish an urgent need for this Court's intervention. First, the Louisiana Fourth Circuit Court of Appeal squarely held that responsibility for the safe transport of hazardous materials may not be delegated by the owner of those materials to an expert shipping company, as a matter of state law. Second, Louisiana's non-delegation rule is clearly inconsistent with, and therefore preempted by, the comprehensive federal scheme governing hazardous materials transportation, which explicitly encourages such delegation. Third, this Louisiana rule imposes an excessive and unjustified burden on interstate commerce, in violation of the dormant Commerce Clause. Fourth, unless it is reversed by this Court, the rule adopted by Louisiana in this case will have an enormous and immediate negative impact on the safety and efficiency of our Nation's transportation system.

Remarkably, the Brief in Opposition does not dispute *any* of these points. It instead seeks only to obscure the important questions presented behind two purported vehicle problems, neither of which has any merit.

I. THE BRIEF IN OPPOSITION EFFECTIVELY CONCEDES THAT THE RULE ADOPTED BY LOUISIANA IN THIS CASE IS IN DIRECT CONFLICT WITH FEDERAL LAW

In the final paragraph of their Brief in Opposition, Respondents concede that the Louisiana Fourth Circuit Court of Appeal held that responsibility for safe transportation of hazardous materials cannot be delegated away from the owner of those materials, *as a matter of Louisiana tort law.* Opp. 12. Respondents also concede (by their complete silence on these issues) that the court of appeal's holding is in direct conflict with the applicable federal regulations, and is therefore preempted by the

Hazardous Materials Transportation Act, 49 App. U.S.C. §§ 1801 *et seq.* (1990) ("HMTA"). Instead of challenging the existence and importance of that square conflict with federal law, Respondents suggest that the Louisiana court's actual holding is somehow "moot" or "not necessary" because that court made "findings" that would have been sufficient to support an alternative holding that Polysar also violated the federal regulations. Opp. 12. That suggestion is both plainly incorrect and irrelevant.

Respondents carefully avoid any assertion that the Louisiana court of appeal *actually held*, in the alternative, that Polysar had not effectively delegated compliance responsibility to Mitsui and GATX under the federal regulations. The plain language of the court's opinion dispels any confusion on that point. The Louisiana court held that "[b]ecause of the importance of those duties to the public safety, we view those duties as non-delegable *as a matter of Louisiana tort law.*" Pet. App. 52a (emphasis added). It accordingly held that "whether Mitsui is an 'independent contractor' to Polysar is of no moment"—expressly declining to reach what would have been the central issue under the federal regulations. *Id.*

Indeed, the portions of the court of appeal's decision which purport to discuss the federal regulations are, at most, an artifice: a transparent attempt to cloak a decision that in fact articulates a rule of law completely contrary to those regulations as interpreted authoritatively by the Department of Transportation ("DOT"). The Louisiana court entirely ignores DOT's "functional" test for determining which party is responsible for regulatory compliance. As explained in the Petition (Pet. 9-10), and conceded by Respondents (Opp. 9-10), that test expressly contemplates that such responsibility may be delegated by contract or commercial practice. *See* Notice No. 90-2, Formal Interpretation of Regulations Issued Under the HMTA, 55 Fed. Reg. 6758, 6760 (Feb. 26, 1990)

(compliance responsibility falls on the party "who performs, attempts to perform, or under the circumstances involved is contractually or otherwise responsible to perform, any of the functions assigned by the [regulations]"). DOT has also made it crystal clear that mere ownership of hazardous cargo is *not* sufficient to impose liability under the federal regulations.[1]

The decision of the Louisiana court of appeal defies federal law on both points. That court held that responsibility for the safe transportation of hazardous materials can *never* be delegated away from the owner by contract or custom as a matter of state law. And although the court asserted that Polysar was not a passive owner "simply awaiting delivery" of the butadiene, Pet. App. 47a, it did not even purport to address whether Polysar in fact performed (or was obligated by contract or custom to perform) any relevant *functions* under the regulations. Instead the court pointed to the obvious commercial realities that Polysar paid to have its product shipped, would have been aware that its product would travel over established rail lines, and could conceivably have imposed additional conditions on Mitsui by contract.[2] By fixating on routine activities that every cargo

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[1] *Id.* Respondents imply that the DOT interpretation does not apply because it was issued after the incident involved in this case. DOT's clarifying interpretations did not effect any substantive change in the regulations that existed at the time of the incident. As a result, "it would be absurd to ignore the agency's current authoritative pronouncement of what the statute [regulation] means." *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 744 n.3 (1996); *see also Pope v. Shalala*, 998 F.2d 473, 483 (7th Cir. 1993) (A clarifying rule "does not change the law, but restates what the law according to the agency is and has always been: 'It is no more retroactive in its operation than is a judicial determination construing and applying a statute to a case in hand.'" (quoting *Manhattan General Equip. Co. v. Commissioner*, 297 U.S. 129, 135 (1936)). Accordingly, DOT's interpretations respectfully do apply and must be accorded deference. Pet. 10.

[2] Pet. App. 47a. With respect to the Polysar "activities" cited by the

owner must perform, the court's "test" will necessarily and by definition dictate a finding that every cargo owner (irrespective of whether it performed even one compliance function) is the "offeror" responsible for hazardous materials safety compliance in Louisiana. Those observations therefore add nothing to the court's core holding—that state law simply imposes tort liability for transportation safety as a non-delegable incident of ownership. *See* Pet. 16.

Unable to find an actual alternative holding in the court of appeal's decision, Respondents marshal a one-sided selection of snippets from the raw trial transcript to argue that a variety of alternative theories "*could* form the basis for culpable fault." Opp. 12 (emphasis added). Respondents suggest, for example, that the Louisiana court *could have* held that Polysar in fact performed regulated functions, or that contractual responsibility for regulatory compliance was in fact uncertain in this case, or even perhaps that Polysar failed to prove the elements of delegation of duty under Louisiana state law (as if the court had not held that to be a legal impossibility). Opp. 7-12. Polysar of course would disagree with all these assertions,[3] if they had any relevance

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Fourth Circuit, the record at trial established that Polysar: (1) "coordinated the shipment"–merely learning from Mitsui and confirming with Mitsui expected dates of departure and arrival of its cargo; (2) "chose a route"–Polysar agreed that its cargo could travel on an established freight train route between Goodhope and Chattanooga; and (3) "paid the freight"– as a responsible owner of cargo, Polysar agreed to pay the public carrier pursuant to the carrier's customary rate structure.

[3] The record clearly established that Mitsui and GATX in fact performed every one of the functional obligations assigned to the shipper or offeror under the federal regulations; that the contracts between the parties assigned those duties to Mitsui; and that there was a twelve-year past practice between the parties of assigning those duties to Mitsui. Mitsui was clearly the shipper or offeror under the federal regulations, and no court that honestly attempted to apply DOT's "functional" test could come to any other conclusion.

at all to the issues before this Court. They do not. The Louisiana court of appeal did not in fact rely upon any of Respondents' alternative theories. It instead squarely held that they were beside the point. Respondents do not, and cannot, cite any precedent for their apparent belief that this Court should abstain from reviewing what a lower court *actually* held, whenever that court might conceivably have held something different.

Respondents' complete silence concerning the actual issues in this case speaks loudly and confirms the obvious. The fundamental holding of the court of appeal is that in Louisiana HMTA compliance obligations cannot be delegated by often unqualified cargo owners to expert hazardous material handlers. The federal regulations, as interpreted by DOT, expressly permit such delegation by contract or commercial custom. By failing to permit the delegation of responsibility sanctioned and encouraged by federal law, the ruling in this case not only constitutes an obstacle to Congress's goals in passing HMTA but emasculates those goals. The two articulated goals of the HMTA are uniformity and safety. The Louisiana court's ruling displaces uniformity with the probability of chaotic inconsistency. It impermissibly permits Louisiana courts to determine who is responsible to conduct compliance duties pursuant to a standard wholly inconsistent with the uniform functional shipper test articulated by DOT. Concomitantly, safety is severely compromised by replacing compliance experts with amateurs, creating uncertainty and confusion in assignment of responsibility for compliance, and introducing interminable delay in shipments. *See* Pet. 17-26; *infra* pp. 8-9. Respondents' Brief in Opposition does not even disagree with, let alone refute, the Petition's discussion of these serious consequences of the decision below.

II. THE BRIEF IN OPPOSITION DOES NOT DISPUTE THAT LOUISIANA'S RULE IMPOSES AN EXCESSIVE AND UNJUSTIFIED BURDEN ON INTERSTATE COMMERCE

The Brief in Opposition similarly does not even attempt to deny or to justify the excessive and unconstitutional burden that the Louisiana rule adopted in this case imposes on interstate commerce. Respondents do not, because they cannot, genuinely deny that requiring purchasers of hazardous materials to personally perform all compliance responsibilities under the DOT regulations will cripple the efficient movement of the 800,000 daily shipments of hazardous materials in interstate commerce. *See* Pet. 24-26; *infra* pp. 8-9.

Respondents attempt to mask this fatal concession by incorrectly claiming that Polysar did not properly preserve the Commerce Clause issue in the state courts. Opp. 3-4. Their argument improperly ignores the sequence of events below. The particular Commerce Clause issue on which the Petition seeks review was not squarely injected into this case until the appellate court held, *sua sponte*, that all duties relating to hazardous materials transportation are inherently non-delegable as a matter of state law. That rationale had not been advanced by Respondents in the trial court or on appeal, and Polysar accordingly did not anticipate (let alone devote briefing to) the possibility that the appellate court would stray in such an extreme and unprecedented direction. Since the judicially-created state tort law rule that Polysar challenges as a Commerce Clause violation *did not exist* until the court of appeal's decision, Polysar obviously cannot be faulted for failing to challenge it sooner. This Court's requirement that issues be properly presented in the lower courts does not demand clairvoyance. After the court of appeal's decision, Polysar availed itself of

the first opportunity—a petition for rehearing—to explain that the court's novel theory imposed an excessive and unconstitutional burden on interstate commerce.

In any event, Polysar's opening brief to the Fourth Circuit Court of Appeal placed both Respondents and the court on notice that the resolution of this case raised serious issues under the dormant Commerce Clause. Respondents did not argue at trial or upon appeal that hazardous materials compliance obligations were inherently non-delegable as a matter of state law. They did, however, argue (*inter alia*) that Polysar could be held liable for approving shipment along an established rail line passing through New Orleans. Polysar argued in its opening brief on appeal that liability predicated on this "routing" theory would violate the Commerce Clause. Polysar reiterated that point in its Reply Brief, and also responded to Respondents' evolving argument by pointing out that "[i]mposing a duty on the cargo owner to duplicate the contractor's work would throw needless barriers of time and expense across the stream of commerce."

Finally, Respondents did not argue at the rehearing stage or upon certiorari to the Louisiana Supreme Court that Polysar had somehow waived the Commerce Clause infirmity in the court of appeal's decision by failing to divine that court's intentions in advance. In any event, the court of appeal itself denied Polysar's petition for rehearing on the merits, dispelling (and waiving) any suggestion that the arguments therein were procedurally defaulted or improper. Pet. App. 58a. And three Justices of the Louisiana Supreme Court voted to grant certiorari. Respondents' suggestion that the Commerce Clause issue is not properly before this Court is therefore wrong and must be rejected.

III. THE BRIEF IN OPPOSITION DOES NOT DISPUTE THE PRACTICAL IMPORTANCE OF THE LOUISIANA COURT'S DECISION

As the Petition explained in detail, Pet. 17-26, the rule of law adopted by Louisiana in this case literally threatens a disaster for our Nation's transportation system and for every sector of the economy that depends, directly or indirectly, on basic industrial chemicals. The *amicus curiae* brief filed in this Court in support of the Petition by the American Chemistry Council and 11 other major national industry associations illustrates the severe consequences that they believe will result if this decision is not reversed. The Brief in Opposition, remarkably, does not disagree.

The Louisiana decision dictates an unworkable commercial scenario. Federal law expressly contemplates the delegation of complex regulatory compliance responsibilities to the expert shipping companies actually performing (and often consolidating) those regulated functions. In light of the 800,000 shipments of hazardous materials each day, reliance upon traditional allocation of responsibility through accepted industry-wide documentation such as bills of lading is required for the transportation of these products with even a modicum of efficiency and safety. The commodities chemical business employs a variety of business arrangements among producers, sellers and buyers, which are often accomplished verbally or through expedient, truncated telex or e-mail communication. Federal law accommodates these commercial realities by appropriately permitting the allocation of compliance responsibilities by contract to the parties best equipped and positioned to fulfill them.

Such delegation by independent contract is now effectively impossible for any shipment that will pass, at any point, through the State of Louisiana. This impacts as much as 25% of the hazardous material moved in this country every

day. Should Louisiana's distorted view of delegability prevail, allocation of compliance responsibility within the chemical industry will not be possible and certainly not operationally achievable as each new, often-remote owner struggles futilely to conduct compliance duties. Purchasers or owners of hazardous commodities will be unable to appropriately transfer compliance responsibility to entities that, from a logistical and expertise standpoint, are best able to assure efficient and safe transport. They will instead be forced to dispatch a representative to all pertinent transfer points in order to second-guess the shipper's judgment about such matters as packaging, labeling, and inspection.

Our docks, terminals and other points of shipment will be hopelessly strangled by this regime. Security likewise will be seriously compromised as credential-wielding purchaser employees demand access to sensitive areas in order to fulfill compliance responsibilities. The resulting uncertainty and delay will threaten an enviable record of the safe transport of these commodities, and waste countless man-hours and millions of dollars in unproductive duplication and disputes over responsibility whenever cargoes change ownership or cross state lines.

Frankly, compliance with Louisiana's novel dictates simply will not be possible from a manpower or contractual perspective for many of the companies in the affected industries—and if this Court fails to intervene, new infringements into this preempted area by other States will surely follow. Congress enacted the HMTA precisely in order to preempt such chaos with uniform national regulation of hazardous materials transport.

CONCLUSION

The Louisiana ruling that a purchaser of hazardous cargo may not delegate offeror compliance responsibilities under DOT's regulations disrupts a uniform, proven and

reliable system which was carefully designed to ensure safe and efficient transport of hazardous materials. If left to stand, it would have a far-reaching and impermissibly crippling effect on interstate commerce. Petitioner respectfully submits that certiorari is warranted and necessary, and indeed that summary reversal of the Louisiana court of appeal's decision would be appropriate.

Respectfully submitted,

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March 12, 2003